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CITATIONS

CASES:

MISCELLANEOUS:

Rules of Criminal Procedure:

IN THE

Supreme Court of the United States

OCTOBER TERM, 1948

No. 27 Misc.

ARTHUR J. FELTON, *Petitioner*

v.

UNITED STATES OF AMERICA

On Motion for Leave to Proceed in Forma Pauperis and on Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia

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MEMORANDUM FOR THE UNITED STATES IN OPPOSITION TO THE GRANTING OF THE PETITION FOR A WRIT OF CERTIORARI

OPINIONS BELOW

The majority (R. 42-44) and dissenting (R. 44-48) opinions have not as yet been reported.

JURISDICTION

The judgment of the court of appeals was entered June 1, 1948. The petition for a writ of cer-

tiorari was filed June 29, 1948. The jurisdiction of this Court is invoked under Section 240(a) of the Judicial Code, as amended by the Act of February 13, 1925. See also Rules 37(b)(2) and 45(a), F. R. Crim, P.

QUESTION PRESENTED

Whether, under the circumstances here presented, it was reversible error for the trial judge to fail to charge the jury explicitly that they could return an unqualified verdict of not guilty, in the absence of any request for instructions or any objection or exception to the charge given.

STATEMENT

The following is a summary of all the proceedings of the trial which resulted in petitioner's conviction of armed robbery:

Eulus Hayes, a taxi cab driver, testified for the Government that: At about 2:10 a.m., November 15, 1946, petitioner hailed and entered Hayes' cab (R. 17).[1] After they had proceeded some distance, petitioner put a gun against Hayes' neck and demanded his money (R. 18). Hayes turned over to petitioner his change carrier containing

[1] The record consists of the joint appendix to the briefs in the court below, paginated from 15 through 41, plus the opinions (pp. 42-48), the judgment (p. 49), the designation of record (p. 50) and the certification of the record. The record is designated "R." in this brief. In addition, there has been lodged with the Clerk of this Court a copy of the complete stenographic transcript of the trial. On occasion in this brief reference is made to parts of this transcript which were not incorporated in the joint appendix. The transcript of the trial is designated "Tr."

about ten dollars and a dollar from his pocket (R. 18). Hayes was told to drive on and his life was threatened, but soon he slammed on the brakes and jumped from his cab (R. 18). Hayes saw petitioner get out of the cab and threaten with his pistol another man who had run up to see what was going on. Hayes watched petitioner cover the man with a pistol, saw him back away and finally turn and run (R. 18). The next morning Hayes positively identified petitioner as the man who had held him up (R. 20, 24), and again positively identified him in court (R. 18). Hayes identified the pistol which had been taken from petitioner the next day (R. 21) as the one with which he was threatened (R. 19) and identified the change carrier introduced in evidence (R. 25) as the one he had turned over to petitioner (R. 19).

Summerfield B. Tillett, a member of the Metropolitan Police, a government witness, identified the gun introduced into evidence (R. 25) as the one he had taken from petitioner when he arrested him on November 16 (R. 21-22).

Metropolitan Police Officer Carl Leonard Hayden, called by the prosecution, identified the change carrier introduced in evidence (R. 25) as the one he discussed with petitioner in Hayes' presence on November 16, 1946 (R. 24). In a very brief cross-examination (R. 25), petitioner's counsel asked Officer Hayden whether petitioner's manner had been "strange," and elicited the testimony that petitioner had neither admitted nor denied to Officer Hayden his commission of the robbery.

The Government then rested, and petitioner produced the following testimony: Dr. Amino Per-

retti, a psychiatrist at Gallinger Hospital (Tr. 21), testified that at the request of the United States Attorney he had examined petitioner on February 23, 1947, at which time petitioner was suffering from a prison psychosis (R. 25). The witness had not examined petitioner in November 1946, but, because of the nature of petitioner's illness in February 1947, presumably he had been sane in November 1946 (R. 26). Dr. Joseph L. Gilbert, also a psychiatrist at Gallinger Hospital, testified that he examined petitioner on February 22 and March 1, 8 and 15, 1947 (R. 26), and found him to be suffering from a prison psychosis (R. 27). Edwin M. Schlegel, of the Veterans' Administration, produced certain records bearing on petitioner's mental condition and disability discharge from the Army (Tr. 33-45).

Petitioner then took the stand and generally denied having any recollection of his activities and movements on and around November 15, 1946 (R. 27-32) or in February and March 1947, when he was sent to Gallinger and Saint Elizabeths Hospitals (R. 27-28). On cross-examination he testified (R. 28):

> Q. Do you remember robbing Hayes?
>
> A. No; I don't.
>
> Q. Would you say you did or did not rob Hayes?
>
> A. I definitely did not.
>
> Q. Why do you say that?
>
> A. Because I can't believe I done it.
>
> Q. Have you any recollection?
>
> A. No; I don't.
>
> Q. You heard Hayes testify, didn't you?

A. Yes; I did.

Q. Was Hayes telling the truth, or is he telling a falsehood?

A. As far as I am concerned, he is not telling the truth.

Q. He is not telling the truth? Why?

A. I have no idea.

Q. Do you remember distinctly where you were on the morning of November 15?

A. No; I don't.

Q. You don't know?

A. No.

Petitioner then proceeded to give a summary history of his Army service (Tr. 51-54). Then he was questioned as to whether he had told an F.B.I. agent in November, after his arrest, that he might feign insanity as a defense to the charge of this robbery (R. 31). He denied having made any such statement, and denied even having ever seen the F.B.I. agent in question (R. 31). On redirect examination, at the end of his testimony, he testified (Tr. 71):

Q. Do you deny holding up Mr. Hayes with this revolver?

A. Of course.

The next witness for the defense was petitioner's wife, who said (Tr. 72-81) that he had been with her in Greensboro, North Carolina, in November 1946; that he cried a great deal during the week before he left there; that after he left he telephoned her on a few occasions, including the day before he was arrested, when he asked her to come to Wash-

ington where he was living; that she did not think he was of unsound mind when she saw him last.

Alex L. Brown, a medical officer stationed at Walter Reed Hospital, called by petitioner, testified (Tr. 81-99) that he had examined petitioner the first part of 1947, and found him suffering from a psychosis at that time. The witness had no opinion as to petitioner's mental condition in November 1946.

Gordon Joseph Armstrong, a guard at the District jail, called by petitioner, testified concerning petitioner's mental condition in the early part of 1947 (Tr. 99-104).

In rebuttal, the Government produced Drs. Bernard Allan Cruvant (R. 32-34) and Stanley Olinik (Tr. 127-134), both psychiatrists at Saint Elizabeths Hospital, who had treated petitioner during his confinement from March 20 through July 21, 1947, and Robert H. Kurtzman (R. 33-34), an F.B.I. agent, who testified that on November 17 and 19, 1946, when he saw petitioner and took two statements from him (R. 33), petitioner appeared sane and rational and

> * * * said, "I don't know what to do about this." He said, "I could act nuts and have them declare me insane, but I don't like anything like that against my record." Those were his words. (Tr. 139.)

Elver V. Hammond, deputy United States Marshal, then called by the defense, identified his signature on petitioner's written statement (R. 34), testified that he was in the adjoining room when Agent Kurtzman spoke to petitioner and heard

the statement by petitioner above quoted from Kurtzman's testimony (Tr. 147-148), and described an episode in which petitioner "went haywire" and was put in a restraining jacket at the time of his arraignment (Tr. 149-151).

The Government then made its opening argument, concerned almost exclusively with the insanity defense (Tr. 153-161). Petitioner's argument was very brief, devoted solely to his defense of insanity (Tr. 162-164). Counsel opened his argument to the jury as follows:

> * * * His Honor will charge you that while this defendant is presumed to be of sound mind, if the defense of insanity is interposed, as it is in this case, there is a burden on the part of the Government to establish the sanity of the individual, and there must go with that and in connection with it the theory of reasonable doubt (R. 35).

He continued:

> Now it is true robbery is a very serious crime. He has testified that he doesn't remember the circumstances of the robbery (R. 35).
>
> Also, His Honor will charge you that if at that time he was not mentally responsible, then he could not be convicted and your verdict would have to be not guilty by reason of insanity. * * * (Tr. 163).

And he concluded:

> Now, where does that leave you? He was of unsound mind according to the testimony of three doctors in the spring. (Tr. 164.)

> Now, to hold that he was of sound mind in November of 1946, you would have to speculate, but you have here the theory of reasonable doubt. His Honor will charge you, and I say to you taking all of that into consideration that you can only arrive at one verdict, that he was not guilty by reason of insanity. (R. 35.)

The Government then made its closing argument, directed to the question of petitioner's mental condition (Tr. 164-166).

The court's charge to the jury started with a discussion of the nature of an indictment (R. 35-36) and proceeded to an instruction as to the Government's burden of proof beyond a reasonable doubt, in the following language (R. 36-37):

> The burden in every criminal case is upon the Government to prove every essential element of the crime alleged, and to do this beyond a reasonable doubt.
>
> What is a reasonable doubt? * * *
>
> It is doubt that is based on reason, either on evidence or the lack of evidence in a given case, so that the Government has the burden of proving the essential elements of a given crime beyond a reasonable doubt as defined to you what is meant by reasonable doubt.
>
> Now, reasonable doubt, it is well to note, does not mean beyond all doubt, not at all. It means a doubt up to the point where you, the Jury, have either moral certitude of the defendant's guilt or the defendant's innocence. * * * It means only up to the point where you,

> the Jury, on all the evidence, have a moral certainty of the defendant's guilt.
>
> This defendant under our system of law, as every other defendant does, comes into court with the presumption of innocence. He is presumed to be innocent until such time as you, the Jury, if you should reach that conclusion, upon all the evidence, beyond a reasonable doubt, are satisfied as to his guilt, and if you reconcile the evidence in the case with any reasonable hypothesis looking toward the defendant's innocence, you are obliged to do so, and you are so instructed.

The charge to the jury then covered the function of the jury as the sole judge of issues of fact and the credibility of witnesses (R. 37-38) and the defendant's right not to take the stand and his waiver of privilege by testifying (R. 38). Then the judge proceeded to discuss the defense of insanity interposed in this case (R. 38-40), after which he briefly instructed as to the purpose of the admission of evidence of prior convictions and as to expert testimony (R. 40). The charge ended with (R. 40-41):

> Again I repeat, you are the sole and exclusive judges of the facts.
>
> Now, there are only two types of verdicts you can possibly return in this case. Your verdict, as the case may be, must be unanimous, and I know that from your attention that you have manifested here throughout the course of this trial you are going to give this case, as you have all other cases you have sat on, the consideration it deserves. There are only two

> types of verdicts you can return; one is a verdict of guilty as charged and the other is a verdict of not guilty by reason of insanity.

There were no exceptions to the charge and no requests for further instruction. The jury returned a verdict of guilty after being out thirty-five minutes (R. 41). On appeal, the conviction was sustained, Associate Justice Stephens dissenting (R. 49).

ARGUMENT

Petitioner objects to the trial judge's failure explicitly to charge the jury that they could return a simple verdict of not guilty (Pet. 1-2).

Rule 30 of the Rules of Criminal Procedure provides that "No party may assign as error any portion of the charge or omission therefrom unless he objects thereto before the jury retires to consider its verdict, stating distinctly the matter to which he objects and the grounds of his objection."

In the instant case not only was there no exception to the charge with respect to the type of verdicts; the charge actually made with respect to a verdict in favor of petitioner was in almost the precise language of petitioner's counsel in his argument to the jury that—

> * * * you can only arrive at one verdict, that he was not guilty by reason of insanity (R. 35).

It is clear that under Rule 30 no objection can now be made to the charge on appeal. *Burns* v. *United States,* 274 U. S. 328, 336; *Cave* v. *United States,*

159 F. 2d 464, 469 (C. C. A. 8), certiorari denied, 331 U. S. 847; *Spevak* v. *United States,* 158 F. 2d 594, 598 (C. C. A. 4), certiorari denied, 330 U. S. 821. The purpose of this portion of the Rule was to give the court an opportunity to correct a charge before its final submission to the jury. In this case, if the matter had been called to the court's attention, it is likely that the present problem would not have arisen.

The question remaining is whether the failure to charge specifically that the jury could return an unqualified verdict of not guilty was an error so "affecting substantial rights" within the meaning of Rule 52 as to have required the Court of Appeals to set aside the conviction. In our view the court below was clearly correct in holding that the charge did not contain any "plain error affecting substantial rights," and that any error in the charge "was not sufficiently prejudicial as to warrant reversal" (R. 43-44).

For during the trial the only defense presented by petitioner's counsel was that of insanity. At no time did counsel argue that petitioner's commission of the robbery had not been proved. On the contrary, his argument amounted to a concession of this fact. Cf. *Norcott* v. *United States,* 65 F. 2d 913, 916 (C. C. A. 7), certiorari denied, 290 U. S. 694. And on all the evidence it would have been practically impossible for the jury to reach any conclusion other than that petitioner had committed the robbery. Cf. *Doremus* v. *United States,* 262 Fed. 849, 853 (C. C. A. 5), certiorari denied, 253 U. S. 487; *Horning* v. *District of Columbia,* 254 U. S. 135, 138.

All of petitioner's testimony was directed toward his defense of insanity. Although it is now argued that petitioner denied the commission of the robbery (Pet. 2; Br. 2, 4), his testimony makes it clear that he simply denied having recollection as to the period involved. Although, as pointed out by Mr. Justice Stephens (R. 47), petitioner said that "of course" he denied the commission of the robbery (Tr. 71), such denial must be read in the light of his extended statements, on both direct and cross-examination (R. 27-32), that he had no recollection of his activities or whereabouts at the time of the offense. Petitioner's testimony was the only evidence submitted even remotely raising any question as to his perpetration of the act. That testimony obviously was not sufficient to create any real or substantial controversy. Cf. *United States* v. *Kushner*, 135 F. 2d 668, 674 (C. C. A. 2), certiorari denied, 320 U. S. 212; *Hewitt* v. *United States*, 110 F. 2d 1, 9 (C. C. A. 8), certiorari denied, 310 U. S. 641.

Petitioner now contends that it was absolutely mandatory for the court unequivocally to instruct the jury that they could return a simple, unqualified verdict of not guilty. The first half of the charge, by its careful and full instructions as to the presumption of innocence and the prosecution to prove each element of the crime charged beyond a reasonable doubt, clearly left open the possibility, purely theoretical in view of the record in this case, of the jury's returning a verdict of not guilty. That the judge later gave specific instructions concerning the real issues as developed and limited by petitioner himself was in accord with the court's

prescribed functions. Cf. *United States* v. *Stilson*, 254 Fed. 120, 125 (E. D. Pa.), affirmed, 250 U. S. 583:

> * * * Every charge to the jury, which is a real charge, and not merely a colorless statement of the law and of the issues of fact involved, ought to reflect the real issue arising out of the evidence, and also as presented in the arguments addressed to the jury. It can never be rightly interpreted unless it is read in the atmosphere of the trial. If the parties, in presenting their cause, strip it of all formalities and technical distinctions, and get right down to the marrow of the case, and to a discussion of the substantial questions involved, it is not only helpful to the jury, but inevitable, that the charge should reflect the same spirit. * * *

As the opinion of the court below points out (R. 44), the present decision is not in conflict with *McAffee* v. *United States*, 105 F. 2d 21 (App. D. C.), and *Williams* v. *United States*, 131 F. 2d 21 (App. D. C.), since—

> In both those cases (capital in nature) the plain issue was, as it usually is in criminal cases, the question of guilt or innocence of the accused; * * *[2]

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[2] For example, in the *Williams* case (at 21) the court said: "There was sufficient evidence, if believed, upon which the verdict, guilty of rape, could be based. Likewise, there was sufficient evidence, if believed, upon which it could be concluded that defendant did not commit the crime."

In the instant case, there was no real question as to whether petitioner had committed the act, the sole issue being the one to which the jury's attention was specifically called by the end of the judge's charge, namely, whether petitioner was legally responsible for the act committed by him.

If it might possibly be held that the failure specifically to instruct the jury as to the right to return a simple verdict of not guilty would have been error if properly called to the court's attention and objected to, it cannot be said that it so affected substantial rights as to require reversal in the absence of a request for such instruction. The Government presented ample clear evidence of petitioner's commission of the robbery. Such evidence was not contradicted nor was its sufficiency challenged, the whole course of the proceedings manifesting petitioner's exclusive reliance on the defense of insanity. Thus, any possible technical error or lack of precision in the charge was harmless error. Rule 52(a), F. R. Crim. P.

CONCLUSION

The decision below is correct and the petition for a writ of certiorari presents no question warranting further review by this Court. The petition should, therefore, be denied.

Respectfully submitted,

PHILIP B. PERLMAN,
Solicitor General.

T. VINCENT QUINN,
Assistant Attorney General.

ROBERT S. ERDAHL,
JOSEPHINE H. KLEIN,
Attorneys.

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